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IN THE

SUPREME COURT OF THE UNITED STATES

SPRING TERM, 1977

No. 76-941

PAUL H. GIBSON, SHERIFF OF GUILFORD COUNTY,
Petitioner

vs.

VOULYNNE SMALL,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Paul H. Gibson, Sheriff of Guilford County prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled cause on September 26, 1976 (Court of Appeals Opinion, *infra*, p. A-10).

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 541 F.2d 277 (4th Cir. 1976) and is included in the Appendix beginning at page A-10. The opinion of the United States District Court for the Middle District of North Carolina is included in the Appendix at page A-1.

JURISDICTION

The judgment of the Court of Appeals was entered on September 26, 1976. An order denying the defendant petitioner's petition for a rehearing, *en banc*, was entered on October 21, 1976. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1) (1966).

QUESTIONS PRESENTED

1. Whether, in the absence of any claim that a public employer's termination of an employee was motivated by a desire to curtail or penalize the employee's exercise of constitutionally protected rights, and in the absence of any claim by the employee of a valid expectation of continued employment under applicable state law, the Due Process Clause of the Fourteenth Amendment to the United States Constitution requires the employee to be afforded notice and a hearing prior to termination, regardless of the circumstances surrounding and the reasons for the termination?

2. Whether a deputy sheriff who concededly had no property interest in her appointment as a deputy, is deprived of "liberty" under the Due Process Clause of the Fourteenth Amendment to the United States Constitution when her appointment is terminated without notice or hearing for violating a General Order of the Sheriff that off-duty deputies conduct themselves in a manner above reproach and so as not to discredit the law enforcement profession, where the conduct which the Sheriff felt violated the General Order was such that it might damage the deputy's reputation?

3. Whether a deputy sheriff's interest in her reputation constitutes a protected "liberty" interest under the Due Process Clause of the Fourteenth Amendment to the United States Constitution where there are adequate remedies under state law for damage to reputation?

4. What constitutes a publication of the reasons for an employee's termination sufficient to invoke the procedural protections of the Due Process Clause to the Fourteenth Amendment to the United States Constitution?

5. Whether a deputy sheriff, who has been terminated for reasons which might damage her reputation and character and those reasons were published, may recover damages absent proof of actual injury and actual loss?

6. Whether the District Court erred in rendering judgment on a theory not raised by the parties in their pleadings or proof or litigated by the parties by consent, and whether the Court of Appeals erred in making the additional finding of fact necessary to support the District Court's judgment and then affirming the judgment?

CONSTITUTIONAL PROVISIONS, STATUES AND RULES INVOLVED

1. The relevant portion of the Fourteenth Amendment to the United States Constitution provides:

> "Nor shall any State deprive any person of life, liberty or property, without due process of law."

2. 42 U.S.C. § 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any right, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

3. The relevant portion of N.C. Gen. Stat. § 153A-103(1) (1974) provides:

> "Each Sheriff and Register of Deeds elected by the people has the exclusive right to hire, discharge, and supervise the employees in his office."

4. The relevant portion of General Order No. 71-2 of the Guilford County Sheriff's Department provides:

> "No member of the Sheriff's Department on duty or not shall act in any manner to bring reproach upon the Department, or Guilford County. Each deputy is to live a quiet, civil, and orderly life, standing as an example to

all citizens. He shall not disturb the peace, become engaged in a brawl, fight, or assault, whereby discredit is caused the Law Enforcement Profession . . Disciplinary action shall be effected immediately by any commanding officer of the Department."

STATEMENT OF THE CASE

The plaintiff-respondent Voulynne Small, a black female former trainee deputy sheriff of Guilford County, North Carolina, filed an action in the United States District Court for the Middle District of North Carolina, Greensboro Division, wherein she alleged that she had been employed as a deputy sheriff of Guilford County on January 8, 1973, and had then been summarily dismissed on February 9, 1973, and further alleged that her dismissal by the defendant-petitioner Paul H. Gibson, Sheriff of Guilford County, was because of her race and color, in violation of 42 U.S.C. § 2000E-2(a)(1). The defendant-petitioner, in his answer, denied that the respondent's dismissal was in any way racially motivated but, to the contrary, alleged that the termination resulted from the respondent's violation of the Code of Conduct: the performance standards expected of deputy sheriffs of Guilford County. The petitioner further alleged in his answer that the dismissal of the respondent was the result of her drinking alcoholic beverages to the point of intoxication and being in a motel with one or more married men who were police officers attending the same training school as the respondent, which conduct was reported to the petitioner by another black deputy.

At the trial of the case the respondent presented evidence in support of the allegations that her dismissal was based on race. The respondent also testified concerning the reasons which the petitioner had given to her, in his private office, for her dismissal. Before she rested her case, however, the respondent offered no evidence that the petitioner publicized, either before or at the time of her dismissal, any statements concerning, or reasons for, the dismissal which would have tended to tarnish her reputation or damage her standing in the community. The respondent's only evidence concerning any publication was that the petitioner told her the reasons for her dismissal in his private office, and that at some time after the termination, petitioner told respondent's father the reasons for respondent's termination.

The petitioner, in turn, put on evidence to show that the respondent's dismissal was totally unrelated to race but rather resulted from conduct on her part which had been reported to him and which he felt violated General Order No. 72-2.

At the conclusion of the trial, even though the District Judge made no finding that there had ever been any publication, either before or after her firing, of the reasons for the respondent's dismissal, and even though there was no evidence or finding that her reputation had suffered any damage or that she had incurred any loss, and even though he found that the respondent's dismissal was totally unrelated to race, the District Court entered judgment for the respondent. In the District Court's Findings of Fact, Conclusions of Law and Opinion, the Court found that:

> "Plaintiff's allegation of racial discrimination in her discharge is not supported by the evidence. It is undisputed the plaintiff was discharged for allegations of intoxication and immoral conduct, which are racially neutral standards in themselves." (Conclusion of Law No. 4) (p. A-6)

Then, even though the issue was not raised in the pleadings or addressed at trial by arguments or evidence presented to the Court, the District Court ruled that:

> "1. Since the plaintiff was discharged for alleged intoxication and immoral conduct, her termination was based on reasons which would tend to damage her standing and associations in her community by tarnishing her reputation and good name. Termination for these reasons would also impose on plaintiff a stigma or employment record that would foreclose her freedom to take advantage of other employment opportunities. Therefore the plaintiff was entitled to notice of the reasons for discharge and the opportunity for a hearing to refute the charges." (p. A-5).

The District Court then awarded the plaintiff back pay.

The petitioner then appealed to the United States Court of Appeals for the Fourth Circuit. In his appeal, the petitioner contended that as a matter of law the respondent had no expectation

of continued employment and was not entitled to notice and a hearing prior to dismissal. The petitioner further argued that even if the reasons for the respondent's dismissal would tend to tarnish her reputation, that the District Court did not find as a fact that those reasons had been published and that therefore its decision could not stand on that basis. The petitioner further contended that it was error for the District Court to decide the case on a theory not presented by the pleadings, evidence or argument of counsel. The Court of Appeals, in a *per curiam* opinion, *found as a fact* that the petitioner had published the reasons for the respondent's dismissal and therefore affirmed the decision of the District Court, basing its decision on *Bishop v. Wood*, ____ U.S. ____, 48 L.Ed.2d 684 (1976), which was decided after this case was argued in the Court of Appeals. The petitioner then timely petitioned the Court of Appeals for the Fourth Circuit for a rehearing, *en banc*, of the appeal, which petition was denied in an order entered October 21, 1976.

REASONS FOR GRANTING THE WRIT

I.

THE RESPONDENT WAS NOT ENTITLED TO NOTICE AND A HEARING PRIOR TO HER TERMINATION FROM THE POSITION OF DEPUTY SHERIFF OF GUILFORD COUNTY BECAUSE SHE CONCEDEDLY HAD NO "PROPERTY" INTEREST IN HER POSITION AND BECAUSE THE WORD "LIBERTY" IN THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION DOES NOT ENCOMPASS THE PROTECTION OF REPUTATIONAL INTERESTS OF A PUBLIC EMPLOYEE.

In his argument in the Court of Appeals and in his brief submitted thereto, counsel for the respondent conceded that the respondent had no expectation of continued employment with the Sheriff's Department of Guilford County. North Carolina General Statute 153A-103(1) clearly gives a Sheriff the unfettered discretion "to hire, discharge, and supervise" those persons he has appointed to be his deputies. The North Carolina Supreme Court, in *Still v. Lance*, 275 N.C. 254, 182 S.E.2d 403 (1971), held that an

expectation of continued employment in North Carolina can exist only if the employer, by statute or contract, has actually granted some form of guarantee. No such guarantee was present in this case. In fact, the evidence clearly showed that a newly appointed deputy in Guilford County was not even considered to be a permanent deputy until he or she had been with the Department for six months. The respondent here had only been with the Department for one month at the time of the termination of her appointment. Therefore, under the reasoning of *Bishop v. Wood*, ____ U.S. ____, 48 L.Ed.2d 684 (1976), the respondent had no expectation of continuing employment and no "property interest" in her position as a deputy sheriff of Guilford County. That being the case, the respondent was entitled to notice and a hearing *only* if the revocation of her appointment invaded a "liberty" interest protected by the Due Process Clause of the Fourteenth Amendment.

In *Paul v. Davis*, ____ U.S. ____, 47 L.Ed.2d 405 (1976), a photograph of Davis, bearing his name, was included in a flyer of "active shoplifters" which was distributed by police chiefs to area merchants in Louisville, Kentucky. Prior to the preparation of the flyer, Davis had been arrested on a charge of shoplifting. However, at the time that the flyer was published and distributed, Davis had not been tried on, or convicted of the charge. Shortly after the distribution of the flyer, the shoplifting charge against Davis was finally dismissed. Davis, alleging that the flyer would inhibit him from entering business establishments for fear of being suspected of shoplifting and would seriously impair his future employment opportunities, filed suit under 42 U.S.C. § 1983 claiming that he had been deprived of "liberty" without due process of law in violation of the Fourteenth Amendment. This Court, in holding that the trial court properly dismissed Davis' complaint, stated that:

> "Respondent in this case cannot assert denial of any right vouchsafed to him by the State and thereby protected under the Fourteenth Amendment. That being the case, petitioner's defamatory publications, however seriously they may have harmed respondent's reputation, did not deprive him of any 'liberty' or 'property' interest protected by the Due Process Clause." *Paul v. Davis, supra*, at 420 (L.Ed.2d)

The present case presents a situation where the respondent's interest in her employment, taken alone, did not constitute a "property" interest under the Due Process Clause, and her interest in her good name and reputation, standing alone, did not constitute a "liberty" interest under the Due Process Clause. The petitioner could have terminated the respondent's employment without stating any reason for the termination and she would not have been entitled to notice and a hearing. Further, the petitioner *could have defamed* the respondent in a situation where the loss of employment was not involved without affording her notice and an opportunity to be heard. The question presented is, therefore, whether or not she has been deprived of "liberty" or "property," as those words are used in the Due Process Clause, when the alleged defamation consisted of the reasons for her termination. Although arguably *Board of Regents v. Roth*, 408 U.S. 564 (1972), *Perry v. Sinderman*, 408 U.S. 593 (1972) and *Bishop v. Wood*, ____ U.S. ____, 48 L.Ed.2d 684 (1976) stand for the proposition that discharging a government employee who has no expectation of continued employment for reasons which would tarnish his reputation invades his "liberty" interest, when the reason for the termination is published and when the termination is accomplished without notice and the opportunity to be heard, the language so stating in all of those cases is *dicta* since none of those cases presented a situation where the reasons for the termination were arguably defamatory and had been published. The central issue in each of those cases was whether the public employee had any expectation of continued employment. This case squarely presents the case where the lower courts have found that the reasons for the respondent's dismissal were defamatory and that those reasons were published. It is submitted that in light of the Court's decision in *Paul v. Davis, supra*, the principles stated in *Roth, Sinderman*, and to some extent, in *Bishop v. Wood*, with respect to reputational interest, should be reconsidered and clarified.

The damage claimed by the respondent in the present case does not differ in kind or quality from the damage claimed by the plaintiff in the *Paul* case. In this case and in the *Paul* case, the sole legally cognizable injury was injury to reputation. In *Goss v. Lopez*, 419 U.S. 565 (1975), while the Court noted that suspension of a student from school based on charges of misconduct could cause damage to the reputation of the student, the court found that all children in the

State of Ohio had the right, under Ohio law, to attend school. In *Marcy v. Brewer*, 408 U.S. 471 (1972), the parolees were granted the right by the state to remain at liberty as long as the terms of their parole were not violated. In *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), the Court was faced with a situation where the individual's right to purchase and consume alcohol was terminated concurrent with the alleged damage to her reputation. In each of those cases, the plaintiff's reputational damage occurred in conjunction with the deprivation of some right guaranteed under state law. In the present case, however, the respondent has been deprived of no legal right granted by state or federal law. She had no legal claim on a job as a deputy sheriff in Guilford County and no "property" interest in the job. She was subject to termination at any time for any reason and had no claim to any expectancy of continued employment. It is submitted that she is in precisely the same position as was the plaintiff in the *Paul* case. By virture of allegedly defamatory statements made by a public official, she claims that her reputation has been injured. It is submitted that it would be inconsistent and anomalous to hold that the respondent in this case has a claim for relief for infringement of a constitutionally protected "liberty" interest and that the plaintiff in the *Paul* case did not. The only fact distinguishing this case from the *Paul* case is that here the respondent's appointment to a job in which she had no protected "property" interest was revoked. It is respectfully submitted that the Due Process Clause of the Fourteenth Amendment to the United States Constitution does not, within the ambit of "liberty" or "property," protect reputational interests. The respondent in this case has been denied no right guaranteed to her by the State or by federal law which would therefore be protected under the Fourteenth Amendment.

Further, it was stated in *Bishop v. Wood* that:

> "The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for every such error. In the absence of any claim that the public employer was

> motivated by a desire to curtail or to penalize the exercise of an employee's constitutionally protected rights, we must presume that official action was regular and, if erroneous can best be corrected in other ways. The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions." *Bishop v. Wood, supra,* at 693 (L.Ed.2d)

If the method and manner in which the respondent was terminated was ill-advised and improper, even then it is neither necessary nor proper for the Federal Courts to provide a forum and remedy for any alleged damage suffered by the respondent. Adequate remedies are already provided in the state courts for any damage which the respondent may have suffered to her reputation or standing in the community. This case presents no more and no less than an action for defamation of character which could have been filed in the state courts.

For all of the above reasons, it is submitted that, first of all, this is a case of first impression which should be decided by this Court, and secondly, if the language in *Roth, Sinderman,* and *Bishop v. Wood* represents the state of the law with respect to "liberty" interests, then such holdings are in conflict with the principles stated in *Paul v. Davis* and merit reconsideration and clarification by this Court.

II.

> EVEN IF THE RESPONDENT WAS ENTITLED TO NOTICE AND A HEARING PRIOR TO HER TERMINATION IF THE REASONS FOR HER TERMINATION HAD BEEN PUBLISHED, THERE WAS NO PUBLICATION OF THE REASONS FOR THE PLAINTIFF'S DISMISSAL SUFFICIENT TO CONSTITUTE A DEPRIVATION OF RESPONDENT'S "LIBERTY" UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Even if the state of the law is such that a public employee who has no property interest in her employment is entitled to notice and a

hearing when the reasons for her dismissal are such as would damage her reputation and they are "published," this Court has not decided what constitutes a "publication" sufficient to invoke the procedural protections of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Other than the evidence that, at some time after respondent's dismissal, the petitioner, at respondent's father's request, told respondent's father the reasons for her dismissal, the only evidence concerning publication in this case was the following question and answer:

> QUESTION (by plaintiff's counsel): "And you have told, have you not, under oath in the pleadings here and to me and to anyone who has come to you and inquired about why Miss Small was let go, you have told she was let go on account of drinking and on account of being in a motel room with men?"
>
> ANSWER (by Paul H. Gibson, Sheriff of Guilford County): "Drinking and in the company of two married men and being in the car."

In the first place, it is not evident from that question and answer that any one other than the respondent's father was ever told the reasons for the revocation of the respondent's appointment. The only publications affirmatively shown by that question and answer were such publications as occurred during the pendency of this lawsuit. In any event, however, it is clear that there was no *public* pronouncement of the reasons for the respondent's dismissal either at the time of her discharge or at any time thereafter. There was no evidence that the petitioner's statements were ever printed in the newspapers. There was no evidence that the reasons for the respondent's dismissal were general knowledge in the community. There was no evidence of communication of the reasons for the respondent's dismissal to any prospective employer of the respondent. The most that the respondent's evidence tended to show was that she was dismissed at one point in time and then at some later point in time one or more persons may have been told the reasons for her discharge. There was no "public posting" concerning the respondent or anything of that sort. There was no evidence

whatsoever that the respondent's character or reputation was injured or damaged in any respect. Therefore, it is submitted that, as a matter of law, there was no "publication" of the reasons for the respondent's dismissal sufficient to invade any "liberty" interest protected by the Due Process Clause of the Fourteenth Amendment.

In *Bishop v. Wood, supra,* the dismissed employee alleged that the reasons for his dismissal were communicated orally to him and also were stated in writing in answer to interrogatories during the course of the litigation. In holding that there had been no publication of the reasons for his dismissal sufficient to invoke the procedural protections of the Due Process Clause, this Court stated that:

> "Since the former communication was not made public, it cannot properly form the basis for a claim that petitioner's interest in his 'good name, reputation, honesty, or integrity' was thereby impaired. And since the latter communication was made in the course of a judicial proceeding *which did not commence until after petitioner had suffered the injury for which he seeks redress, it surely cannot provide retroactive support for his claim.*" (Emphasis supplied) *Bishop v. Wood, supra,* at 692 (L.Ed.2d)

It is submitted that the clear import of the above emphasized language is that before a publication of the reasons for an employee's dismissal can invade the employee's protected "liberty" interest, the publication must be concurrent with, and in the course of the termination. If such is not the case, then the right to notice and a hearing before dismissal could arise retroactively long after the dismissal has taken place. If the evidence presented in this case showed any publication, then such publication occurred at some point in time after the respondent's dismissal and not concurrent with and in the course of the dismissal. It is submitted that, as a matter of law, any such publication was insufficient to invoke the procedural protections of the Due Process Clause. It is submitted that if the right to notice and a hearing is to arise, it must arise at the time of the dismissal and not arise retroactively at some later point in time. The respondent in this case is in no different situation than was the plaintiff in the *Paul* case. She was allegedly

defamed by an elected official, which defamation was not concurrent with any change in the respondent's legal status, and therefore, invaded no "liberty" interest.

Even if, when a public employee who has no expectation of continued employment is discharged for reasons which could be defamatory and the reasons are made public, he must be given notice and a hearing, it is submitted that the publication of the defamatory reasons must be proximate and concurrent with and in the course of the discharge. Although *Bishop v. Wood, supra,* and *Paul v. Davis, supra,* imply that this is the law, this Court has never directly addressed this issue and it is submitted that the Court should grant *certiorari* in order to consider and clarify this point.

III.

THE RESPONDENT WAS ERRONEOUSLY AWARDED SUBSTANTIAL DAMAGES WITHOUT ANY PROOF OF ACTUAL INJURY OR ACTUAL LOSS.

When a governmental employee having a "property" interest in his job is improperly terminated, *i.e.*, without notice and a hearing, there is no difficulty in ascertaining his damages. Obviously, the employee should be entitled to back pay because he has been wrongfully deprived of his job. The situation is different, however, where the employee has no "property" interest in the job, but is allegedly entitled to damages because his "liberty" interest has been invaded. In such a case, the injury is not the loss of the job. The employee had no legal claim of entitlement to the job. The injury, rather, stems from the publication of the reasons for the dismissal where the reasons would damage his reputation and he has had no opportunity to refute them. In such a case, he has not been wrongfully deprived of his job but instead his character and reputation have been wrongfully damaged. In this situation, back pay is not the proper measure of damages. It is submitted that no damages may be awarded in cases such as this unless the plaintiff proves actual injury to his reputation and actual loss.

In this case, it is undisputed that the petitioner could have fired the respondent without giving a reason and would have incurred no legal liability, *Bishop v. Wood, supra,* regardless of how much

difficulty the respondent had finding other employment. That being the case, it is submitted that the respondent should not be allowed recovery where the reasons for her dismissal were communicated to one or more persons unless she can show that her reputation has actually suffered damage and job opportunities were actually foreclosed.

The situation presented here is not dissimilar to that presented in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), in which it was held that, in a defamation action under state law, it was not proper to permit recovery of presumed damages absent a showing of actual injury, or at least knowledge of falsity or reckless disregard for the truth by the person uttering the defamation. If that is the law with regard to state law defamation actions, it is not at all clear why a party in a federal defamation action should be allowed a recovery upon a lesser showing. The respondent here did not put on one iota of evidence that her reputation had actually been damaged. She did not put on one iota of evidence to show that the fact that she submitted many job applications and received few job offers resulted from the publication of the reasons for her discharge. She did not even show that any organization to which she applied for a job even knew of the reasons for her discharge as a deputy sheriff. Further, neither the District Court nor the Court of Appeals found such facts. In fact, the evidence showed affirmatively that the respondent ultimately obtained a much better job at a substantially increased pay than she had had with the Sheriff's Department of Guilford County. (During the course of the trial the judge stated: "A note of humor, if I might — it looks like the other side might have counterclaimed for betterment. Miss Small has a job now where she doesn't have to go the rigors of what enforcement people have to do at a much greater salary, and you often wonder about your life — things that look like they're disastrous often are stepping stones.")

Based on this, it is submitted that the damage award to the respondent was improper and cannot stand. Logic and justice require that before a plaintiff be awarded damages, he be required to show that he has suffered some damage from the wrong complained of, especially in a case where the award is to be paid by the taxpayers of the county. It is submitted that this Court has not addressed itself to the question of the proper measure of damages to be applied in "liberty" interest cases and that the Court should grant *certiorari* in this case in order to consider this issue.

IV.

THE TRIAL COURT IMPROPERLY RENDERED A JUDGMENT IN THIS CASE ON A THEORY NOT RAISED BY THE PARTIES IN THEIR PLEADINGS OR PROOF OR LITIGATED BY THE PARTIES BY CONSENT, AND THE COURT OF APPEALS ERRED IN AFFIRMING THE JUDGMENT AFTER MAKING AN ADDITIONAL FINDING OF FACT NOT FOUND BY THE DISTRICT COURT.

One thing is abundantly clear in this case. The trial court decided the case on a wholly different theory from that which was raised by the pleadings and evidence and argued at the trial. The respondent's complaint plainly stated a cause of action based on racial discrimination. The trial briefs of the parties were directed to the point of racial discrimination. All of the evidence at the trial was directed to the point of whether the respondent was discharged because she was black. The arguments of counsel at trial were directed to the point or racial discrimination. After all of this, however, the Court decided the case for the respondent on the legal theory that the respondent's due process rights to notice and a hearing were abridged. This point was never raised by the parties.

In the leading case of *Sylvan Beach, Inc. v. Koch*, 140 F.2d 852 (8th Cir. 1944) the Court stated that:

> "A Court may not, without the consent of all persons affected, enter a judgment which goes beyond the claim asserted in the pleadings. Unless all parties in interest are in court and have voluntarily litigated some issue not within the pleadings, the Court can consider only the issues made by the pleadings, and the judgment may not extend beyond such issues nor beyond the scope of relief sought . . .
>
> The foregoing rules are fundamental and state nothing more than the essentials of due process and fair play. They assure to every person his day in court before judgment is pronounced against him." *Sylvan Beach, Inc. v. Koch, supra*, at 861.

It is submitted that the petitioner was not given his day in court in this case on the question of whether the requirements of notice and a hearing under the Due Process Clause of the Fourteenth Amendment to the United States Constitution had any application to the respondent.

In its opinion the District Court stated that:

> "The contentions in the pleadings, testimony at trial and the arguments in the trial briefs and proposed findings focused primarily on the issue of whether plaintiff was discharged because of her race. However, the complaint, the evidence at trial and, to a certain extent, the briefs of the parties raised and discussed the issue of whether plaintiff was entitled to and did receive adequate notice and an opportunity for a hearing before she was discharged. While it would have been preferable to have the due process issue of notice and hearing more fully litigated and while this court does not wish to stray too far from the procedural adage of 'ain't no allegata without probata and no probata without allegata' by ruling on issues not raised by the parties themselves, there is sufficient evidence to warrant findings of fact and conclusions of law to be made on both the race and the due process issue." (p. A)

As shown above, the District Court recognized that the theory upon which it decided the case was not raised by the parties. The petitioner was not prepared to litigate and did not litigate the question of whether or not the respondent was entitled to notice and a hearing under the Due Process Clause of the Fourteenth Amendment. The petitioner had no notice that any such issue was to be litigated. He was given no opportunity to prepare for and defend against any such issue. Had the petitioner been on notice that the issue was to be litigated, the presentation of his evidence, the cross-examination of the respondent's witnesses, and the legal authorities brought to bear on the case would have been entirely different. It is submitted that it is fundamentally unfair to the petitioner to have litigated a case based on racial discrimination, conclusively show that no such discrimination existed, and then have a judgment entered against him based on a wholly different

legal theory. It is submitted that the judgment of the District Court, for this reason, is erroneous, improper and cannot be sustained.

On appeal to the United States Court of Appeals for the Fourth Circuit, the petitioner raised this question. However, not only did the Court of Appeals not address the question in its *per curiam* opinion, it proceeded to make a new and additional finding of fact that the petitioner had published the reasons for the respondent's discharge and then, based on that, affirmed the District Court's ruling. It is submitted that in so doing the Court of Appeals clearly exceeded its authority. It is not the place of an Appellate Court to sit as the finder of fact in a case. *United States v. Jacques*, 463 F2d 653 (1st. Cir., 1972); *cf.* Rule 52 of the Federal Rules of Civil Procedure. If the facts found by the Trial Court are not sufficient to support the judgment, then the judgment may not stand. This is precisely the situation presented by this case. As a matter of law, the respondent had no property interest in her position as a deputy sheriff which would require notice and a hearing before her dismissal. Therefore, even if the *dicta* statements in *Roth, Sinderman* and *Bishop v. Wood*, concerning damage to reputation represent the state of the law, the respondent would only be entitled to notice and a hearing if the reasons for her dismissal were such as would damage her reputation and those reasons were made public at the time of her dismissal. Here the District Court made no finding that the reasons for the respondent's dismissal were published. Therefore, in order to sustain the District Court's ruling the Court of Appeals itself found as a fact that there had been a publication. It is submitted that this is erroneous and improper as a matter of law and that, therefore, this Court, exercising its supervisory authority over the Courts of the United States, should grant *certiorari* in this case in order to correct the Court of Appeals' erroneous application of its power.

CONCLUSION

It is submitted that the recent cases of *Paul v. Davis, supra* and *Bishop v. Wood, supra*, place in doubt the circumstances under which, if at all, a public employee is entitled to notice and a hearing prior to dismissal when he is dismissed for reasons which would damage his reputation, and those reasons are published. This question requires and deserves consideration by this Court and it is, therefore, important that this Court grant a writ of *certiorari* to consider the question.

Further, it is submitted that this Court has not yet considered the questions with respect to publication and damages which are presented herein and that those questions are of sufficient significance to require a decision by this Court.

For these and other reasons stated, this petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

VOULYNNE SMALL,	)
Plaintiff	)
	)
v.	)NO. C-412-G-73
	)
PAUL H. GIBSON, Sheriff	)
of Guilford County,	)
Defendant	)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND OPINION

GORDON, Chief Judge

In this case, the plaintiff challenges under 42 U.S.C. § 1983 and 42 U.S.C. § 2000e-2(a)(1) her discharge from employment as female juvenile detective with the Guilford County, North Carolina, Sheriff's Department. The plaintiff seeks to recover back pay from the date of her discharge and attorney's fees.[1] Before commencing a discussion of the facts in this case, a few comments concerning the procedural development of this case and the focus of this opinion are in order. The contentions in the pleadings, testimony at trial and the arguments in the trial briefs and proposed findings focused primarily on the issue of whether plaintiff was discharged because of her race. However, the complaint, the evidence at trial and, to a certain extent, the briefs of the parties raised and discussed the issue of whether plaintiff was entitled to and did receive adequate notice and an opportunity for a hearing before she was discharged. While it would have been preferable to have the due process issue of notice and hearing more fully litigated and while the Court does not wish to stray too far from the procedural adage of "ain't no allegata without probata and no probata without allegata" by ruling on issues not raised by the parties themselves, there is sufficient evidence to warrant findings of fact and conclusions of law to be made on both

[1]The plaintiff originally sought reinstatement to her position as female juvenile officer but no longer seeks this relief because she has found preferable and satisfactory employment elsewhere.

the race and the due process issue. *See Jurinko v. Edwin L. Weigand Co.*, 477 F.2d 1038, 1045 (3rd. Cir. 1973). In fact, any other course of action would be an abrogation of the Court's judicial duty in light of the evidence in this case.

FINDINGS OF FACT

1. Defendant hired plaintiff for the position of female juvenile detective at a salary of $573.00 per month on January 8, 1973.

2. At the time of hiring plaintiff was provided with a copy of an employee's manual, which was in force during the time of her employment. This manual contained General Order No. 71-2, which provides among other things:

> "No member of the Sheriff's Department, on duty or not shall act in any manner to bring reproach upon the Department, or Guilford County. Each deputy is to live a quiet, civil, and orderly life, standing as an example to all citizens. He shall not disturb the peace, become engaged in a brawl, fight, or assault, whereby discredit is caused the Law Enforcement Profession . . . Any deputy or member of the Department while on duty or in uniform shall not consume any whiskey, wine, beer, or other intoxicants except in the line of duty. He will not report for duty having the odor or evidence of having recently consumed any intoxicating substance. Disciplinary action shall be effected immediately by any commanding officer of the Department."

Defendant interprets and applies the provisions of General Order No. 71-2 to the effect that social drinking or moderate consumption of alcoholic beverages, not during duty hours, is permissible.

3. Plaintiff was assigned to defendant's department in a training status. She did not have any arrests, investigation, or other substantial law enforcement duties to perform during her period of employment.

4. On February 5, 1973, plaintiff, as a part of her duties as a deputy sheriff, entered a two week school on narcotics and drugs at Guilford Technical Institute. While attending this school, plaintiff

became acquainted with Purvis Rogers and Joseph Buck, members of the New Bern, North Carolina, Police Department, who were also students in the course.

5. On February 6, 1973, plaintiff had lunch with Messrs. Rogers and Buck.

6. By prearrangement on February 7, 1973, at about 10:00 P.M., plaintiff and Guilford County Sheriff's Deputy Harry Knight went to the room of Messrs. Rogers and Buck at Holiday Inn Four Seasons. The four of them remained in the motel room until about 12:30 A. M. During this time Messrs. Rogers and Buck consumed moderate amounts of alcohol. While the plaintiff denies that she had anything to drink, Mr. Knight testified that during the course of the evening plaintiff drank to the point of being under the influence. The door of the motel room was left open during at least a portion of the time of the visit. On this occasion, the four officers discussed law enforcement matters, carried on casual conversation, and watched television. Plaintiff and Mr. Knight drove back together to Mr. Knight's car, and then plaintiff drove home.

7. On February 8, 1973, plaintiff again met Messrs. Rogers and Buck at their motel room. She went to a friend's house and to dinner with Mr. Rogers, and returned with him to the motel room at about 7:30 or 8:00 P. M. They were expecting Mr. Knight to join them again. However, he called at about 9:00 P. M. to say that he was tied up in an investigation and would not be able to meet them. On this occasion Messrs. Rogers and Buck again consumed alcoholic beverages, but plaintiff contends she did not. Again the evidence is that the door to the motel room was left open.

8. Both Messrs. Rogers and Buck are married men. Plaintiff was and is single.

9. On February 8 and 9, 1973, Deputy Sheriff Harry Knight reported to his supervisors and to defendant that he had accompanied plaintiff to the motel room occupied by the officers from New Bern on the first night and had by telephone ascertained plaintiff's presence in the room on the second night. Mr. Knight stated to his supervisor and to defendant that plaintiff consumed alcoholic beverages on these occasions and in his opinion had become intoxicated, and that when Mr. Buck was away from the

room Mr. Rogers attempted to talk Mr. Knight into leaving him alone with plaintiff. After seeing an automobile that resembled plaintiff's in the Holiday Inn parking lot between 2:00 and 3:00 A.M., on February 9, but without ascertaining the identification or registration of this vehicle, Mr. Knight expressed his opinion to his supervisors and to defendant that this was plaintiff's vehicle.

10. During the time of her employment with defendant, plaintiff was regularly dating Jerry Brown. Mr. Brown was married, but had been separated from his wife for several months. Deputy Sheriff Knight also reported to defendant that plaintiff was regularly going out with a married man who was living with his wife.

11. Defendant believed the report received from Deputy Sheriff Knight. He instructed his administrative assistant, Cecil Webster, on February 9, 1973, to discharge the plaintiff.

12. Mr. Webster called the plaintiff into his office on February 9 and discussed with her the situation at the motel with the policemen from New Bern, reports she was dating a married man and reports of her intoxication. Mr. Webster informed her that her employment was terminated.

13. The plaintiff then saw Sheriff Gibson who confronted her with Deputy Knight's reports about her drinking and dating married men and informed her that her employment was terminated. Sheriff Gibson's reasons for discharging plaintiff was that she had become intoxicated and that she engaged in immoral conduct with married men.

14. During the five years preceding March 29, 1974, four Sheriff's Deputies, all white, were discharged by defendant for violating General Order No. 71-2 with respect to the use of intoxicants. One of the individuals was arrested for public drunkenness and disorderly conduct, and another was arrested for driving under the influence of alcohol. Two of the individuals were observed to be under the influence of alcohol while on the job, with this condition adversely affecting their work. During the same period four Sheriff's Deputies were discharged by defendant for sexual immorality in violation of the same General Order. All four of these persons either had lived with or spent the night with persons of the opposite sex to whom they were not married. All of the deputies discharged on these grounds were white.

15. In April, 1973, a black person was hired as a replacement for plaintiff by Sheriff Gibson from a group of white and black applicants.

16. Deputy Knight, whose investigation and report formed the basis for plaintiff's discharge, is black.

17. Following her discharge, plaintiff commenced making diligent and good faith efforts to secure new employment. In May, 1974, she was hired as a counselor in a technical institute at a salary substantially higher than the salary she received while in defendant's employ. Prior to obtaining this position, plaintiff worked on and completed her master's degree, and maintained two jobs. She was employed by A & T State University as a research assistant from September, 1973, to May, 1974, at the rate of $277.00 per month; and she was employed by Sears, Roebuck & Company, where she earned an average of $225.00 per month from September through December, 1973. In addition plaintiff drew unemployment compensation for a period of six weeks totaling $250.00. Plaintiff attended summer school at North Carolina A & T State University during the summer of 1973 carrying two courses.

18. Plaintiff filed a charge of discrimination against defendant with the Equal Employment Opportunity Commission by letter dated April 10, 1973. By two subsequent letters, her attorney made inquiry of the Charlotte District Office of the Equal Employment Opportunity Commission as to the status of her claim. No acknowledgement of the charge of discrimination or of the letters of inquiry, and no other communications of any kind were received by plaintiff or her attorney from the Equal Employment Opportunity Commission prior to the date on which this action was commenced.

CONCLUSIONS OF LAW

1. Since the plaintiff was discharged for alleged intoxication and immoral conduct, her termination was based on reasons which would tend to damage her standing and associations in her community by tarnishing her reputation and good name. Termination for these reasons would also impose on plaintiff a stigma or employment record that would foreclose her freedom to take advantage of other employment opportunities. Therefore, the plaintiff was entitled to notice of the reasons for discharge and the opportunity for a hearing to refute the charges. *Bd. of Regents v. Roth*, 408 U.S. 564, 573 (1972).

2. The undisputed series of events leading up to plaintiff's discharge (Findings of Fact Nos. 6, 10, 11, 12, 13) demonstrate that plaintiff was given neither adequate notice nor an opportunity for a hearing. This failure constitutes a violation of due process and 42 U.S.C. § 1983 entitling plaintiff to an award of back pay. *Horton v. Orange County Bd. of Educ.*, 464 F.2d 536, 538 (4th Cir. 1972).

3. Plaintiff exhausted all of her administrative remedies under 42 U.S.C. § 2000e-5(f)(1).

4. Plaintiff's allegation of racial discrimination in her discharge is not supported by the evidence. It is undisputed that plaintiff was discharged for allegations of intoxication and immoral conduct, which are racially neutral standards in themselves. Furthermore, the evidence that white employees had been discharged under this same provision (General Order No. 71-2) for conduct more reproachable or deplorable than plaintiff's conduct, as reported by Deputy Knight, does not alone establish that defendant employed a more arbitrary or rigorous application of the General Order to black employees than white. On the contrary, this evidence manifests the use of General Order 71-2 primarily against white employees and not as an instrument which either intentionally discriminates or has the effect of discriminating against blacks. *Compare United States v. Chesterfield City. School Dist.*, 484 F.2d 70 (4th Cir. 1973).

5. The plaintiff has presented some evidence that the Sheriff's Department has hired a disproportionately low number of blacks, that blacks are underrepresented in preferred and prestigious positions and that more rigorous standards are applied in selecting black employees than whites. This evidence has been denied. However, regardless of whose version of these facts the Court accepts, there is simply no evidence to support the contention that plaintiff's discharge was because of her race. Even if the plaintiff has demonstrated a pattern of racial discrimination or statistical evidence of past discriminatory employment practices, there is no evidence that General Order 71-2 has been used in the past or was used in this case to discharge plaintiff because she was black, rather the evidence is to the contrary. *See Cannady v. Person Cty. Bd. of Educ.*, 375 F.Supp. 689, 696-97 (M.D.N.C. 1974).

6. The Court concludes that in light of the ostensibly neutral standard by which the plaintiff was judged (General Order 71-2), the evidence that this standard has been applied in a manner which has *not* been discriminatory toward blacks, the fact that plaintiff was replaced by a black and the fact that a black, Deputy Knight, was the main investigating officer in plaintiff's case, plaintiff's discharge was not racially motivated and no violation of Title VII of the 1964 Civil Rights Act is found.

7. The Court finds that plaintiff was not afforded adequate notice or an opportunity for a hearing prior to discharge in violation of plaintiff's due process rights and her rights under 42 U.S.C. § 1983.

RELIEF

1. There is no need for a ruling on plaintiff's right to reinstatement since she no longer seeks that remedy. Therefore, it is unnecessary for the Court to decide whether her discharge pursuant to General Order 71-2 was proper. *See Horton*, 464 F.2d at 537.

2. Plaintiff is entitled to an award of back pay as female juvenile officer in the amount of $4,092.00. This award requires the Court to set forth certain subsidiary findings and computations supporting the award in compliance with *O'Neal v. Gresham*, Civil No. 74-2030, 74-2031 (4th Cir., decided July 8, 1975).

a. The parties agree and the Court finds that plaintiff, following her discharge, commenced making diligent and good faith efforts to secure new employment.

b. Plaintiff at all times prior to December 31, 1973, made a reasonable effort to mitigate her damages by holding down one, and for a few months, two jobs, while working toward completing her masters degree at North Carolina A & T State University.

c. While there is evidence that plaintiff attended summer school in 1973 when she might have been employed, the Court cannot say that this was a violation of her duty to mitigate damages. The summer courses were directed toward securing her master's degree. Moreover, she qualified for unemployment compensation for those six weeks of summer school, a fact which is further evidence that she was not avoiding employment. The unemployment compensation received for those six weeks will be deducted from the back pay award. *Diaz v. Pan American World Airways, Inc.*, 346 F.Supp. 1301, 1309 (S.D.Fla. 1972).

d. There is no evidence that the plaintiff was ever offered employment which she declined to accept. However, there is evidence that during the period January 1, 1974, to May 1, 1974, she continued to actively pursue studies leading to completion of her work to secure a master's degree, which degree was awarded in May, 1974, while abandoning, in part, her efforts to maintain employment in a manner which would fully minimize her loss of salary by reason of her discharge.

e. Therefore, the Court cannot find and conclude that a diligent and good faith effort was made to fully mitigate her damages during this period and, therefore, concludes that for the period January 1, 1974, to May 1, 1974, no back pay should be awarded. *See Brito v. Zia Co.*, 478 F.2d 1200, 1204 (10th Cir. 1973); *Jurinko v. Edwin L. Weigand Co.*, 477 F.2d 1038, 1046 (3d. Cir. 1973).

f. On May 1, 1974, the plaintiff obtained employment at a salary of $11,076.00 per annum, substantially higher than she was paid by the defendant, and thus is not entitled to consideration for back pay after May 1, 1974.

3. All of plaintiff's earnings from the time of discharge in February, 1973, to December 31, 1973, will be deducted from the back pay award. *Jannetta v. Cole*, 493 F.2d 1334, 1338 (4th Cir. 1974).

4. The back pay award is arrived at by the following computations.

a. Feb. 9, 1973 (date of discharge to August 31, 1973:
6 months & 19 days at $573.00 per month
6 x $573.00 = $3438.00)
) = $3,827.00
19/28 x $573.00 = $389.00)
$3827.00 − $250.00 (unemployment compensation for 6 weeks in summer 1973) = $3577.00

b. Sept. 1, 1973, to Dec. 31, 1973 (4 months): $573.00 (monthly salary with defendant) x 4 = $2292.00
Subtract the following earnings:
(i) Sept. 1973 to Dec. 31, 1973 — employment at Sears, Roebuck & Co. at $225.00 per month — 4 x $225.00 = $900.00
(ii) Sept. 1973, to Dec. 31, 1973 — employment at A & T State University at $277.00 per month — 4 x $277.00 = $1108.00
Sum of (i) and (ii) = $900.00 + $1108.00 = $2008.00
$2292.00 (what she would have earned — back pay award) − $2008.00 (what she did earn) = $284.00 a. + b. = $3577.00 + $284.00 = $3861.00. Interest (at 6%) on $3861.00 = $231.66
TOTAL BACK PAY AWARD — $3861.00 + $231.66 = $4092.66

5. The plaintiff is denied her request for attorney's fees. Such denial is clearly required in this action. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y.*, 42 U.S.L.W. 4561 (decided May 12, 1975); *accord O'Neal v. Gresham, supra*, at 7.

Accordingly, a judgment will be entered.

s/ Eugene A. Gordon

United States District Judge

August 15, 1975

A True Copy
Teste:
Carmon J. Stuart, Clerk
By: _____
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Voulynne Small,

Appellee,

versus

Paul H. Gibson, Sheriff
of Guilford County,

Appellant.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Eugene A. Gordon, District Judge.

Argued March 29, 1976 Decided Sept. 17, 1976

Before HAYNESWORTH, Chief Judge,
WINTER and BUTZNER, Circuit Judges

Perry C. Henson (Ronald G. Baker, Henson, Donahue & Elrod, W. B. Trevorrow, County Attorney, William L. Daisy, Assistant County Attorney, Guilford County Attorney's Office on brief) for Appellant; Norman B. Smith (Smith, Patterson, Follin, Curtis & James on brief) for Appellee.

PER CURIAM:

Voulynne Small, a black female deputy sheriff trainee, was discharged by the Sheriff of Guilford County for intoxication and immoral conduct. The Sheriff told the Chief of Police of New Bern, North Carolina, that Small had engaged in immoral behavior with two men. Whenever anyone asked him why he fired Small, he responded that he did it "on account of drinking and on account of being in a motel room with men." Although termination under these circumstances obviously foreclosed certain employment opportunities, she was provided no notice of the reasons for discharge and was given no opportunity for a hearing in which she could attempt to refute the charges. She was deprived of due process by not receiving that to which she was entitled — notice and a hearing. Therefore, the district court awarded her damages.

The Sheriff appeals from the judgment. We find his appeal to be without merit. The Supreme Court recently said in *Bishop v. Wood*, 44 U.S.L.W. 4820 (U. S. June 10, 1976), that no liberty interest was infringed and no hearing required when the reasons for discharge of a state employee were not made public, even if those reasons were false and even if they would stigmatize him. The Court reasoned that if the reasons were not made public, no stigma could result, no matter how serious or how false the grounds for discharge. This case is different; here, the Sheriff publicized his reasons.

We affirm the judgment of the district court.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Voulynne Small,

Appellee,

versus

Paul H. Gibson, Sheriff
of Guilford County,

Appellant.

ORDER

Upon consideration of the petition for rehearing, no request for a poll of the court being made on the suggestion for rehearing *en banc*, and with the concurrence of Judge Winter and Judge Butzner,

IT IS ORDERED that the petition be, and the same is hereby, denied.

s/ Clement Haynsworth, Jr.

Chief Judge, Fourth Circuit

October 21, 1976

Supreme Court, U. S.
FILED
FEB 7 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-941

PAUL H. GIBSON, SHERIFF OF GUILFORD COUNTY

Petitioner,

v.

VOULYNNE SMALL,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Counsel for Respondent

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-941

PAUL H. GIBSON, SHERIFF OF GUILFORD COUNTY

Petitioner,

v.

VOULYNNE SMALL,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Voulynne Small respectfully opposes the petition for writ of certiorari in this proceeding, seeking to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this cause on September 26, 1976.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 541 F.2d 277 (4th Cir. 1976), and is set out in the petition for certiorari (A-10 to 11). The opinion of the United States District Court for the Middle District of North Carolina is not published, but is set out in the petition for certiorari (A-1 to 9).

JURISDICTION

Petitioner seeks to invoke this Court's jurisdiction under 28 U.S.C. sec. 1254(1). The judgment of the United States Court of Appeals for the Fourth Circuit was entered on September 26, 1976. As stated below, respondent contends that this proceeding should be dismissed for failure to file petition for writ of certiorari within the time provided by law.

QUESTIONS PRESENTED

1. Whether a law enforcement officer discharged for immoral conduct with married persons and intoxication, is entitled to notice and hearing.

2. Whether the district court abused its discretion in regarding the parties to

have litigated by consent the issue of denial of respondent's liberty interest.

3. Whether the petition for certiorari should be dismissed for not having been filed within the time allowed.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The relevant portion of the Fourteenth Amendment to the United States Constitution provides:

> "Nor shall any State deprive any person of life, liberty or property, without due process of law."

2. 42 U.S.C. sec. 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any right, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

BEST COPY AVAILABLE

STATEMENT OF THE CASE

Respondent, a black female, was employed by defendant, the Sheriff of Guilford County, on January 8, 1973, to serve as a juvenile detective in the Guilford County Sheriff's Department. On February 9, 1973, respondent was summarily discharged without notice and hearing. (Court of Appeals Appendix 1, 10, 57, 60-61).

Petitioner's reasons for discharging respondent were that she had engaged in immoral conduct with married men and that she had become intoxicated. (Court of Appeals Appendix 60-61).

At the time of discharge respondent was in a training status in the Sheriff's department. (Court of Appeals Appendix 58). Respondent has not contended that she had a permanent position of employment with the department.

On February 5, 1973, respondent began a two-week school on narcotics and drugs at Guilford Technical Institute, as a part of her training in the department. While attending this school, she became acquainted with Purvis Rogers and Joseph Buck, members of the New Bern, North Carolina, police department, who were fellow students. (Court of Appeals Appendix 58).

On February 6, respondent had lunch with Messrs. Rogers and Buck. By prearrangement on February 7, at about 10:00 P. M., respondent and Guilford County Sheriff's Deputy Harry Knight went to the motel room of Messrs. Rogers and Buck. The four of them remained in the room until about 12:30 A. M. During this time Messrs. Rogers and Buck consumed moderate amounts of alcohol. The evidence is in conflict as to whether respondent had anything to drink on this occasion. The door of the motel room was left open during at least a portion of the time of the visit. While in the room, the four officers discussed law enforcement matters, carried on casual conversation, and watched television. Respondent and Mr. Knight drove back together. (Court of Appeals Appendix 59).

On February 8, respondent went to dinner with Mr. Rogers, and returned with him to the motel room at about 7:30 or 8:00 P. M. They were expecting Mr. Knight to join them again. However, he called at about 9:00 P. M. to say that he was tied up in an investigation and would not be able to meet them. Messrs. Rogers and Buck again consumed alcoholic beverages, but respondent states that she did not. The door to the motel room was left open. (Court of Appeals Appendix 59).

During the time of her employment with petitioner, respondent had been regularly dating Jerry Brown, to whom she is now married. Mr. Brown was at that time married to his first wife, but had been separated from her for several months. (Court of Appeals Appendix 60).

Deputy Sheriff Knight reported to his supervisors and to petitioner, that he had accompanied respondent to the motel room on February 7, and by telephone had ascertained respondent's presence in the room on February 8. Mr. Knight stated that respondent had consumed alcoholic beverages and in his opinion had become intoxicated. He stated that Mr. Rogers had attempted to talk Mr. Knight into leaving him alone with respondent. Mr. Knight told his supervisors and petitioner that he had seen respondent's automobile in the Holiday Inn parking lot between 2:00 and 3:00 A. M. on February 8, but he testified only that this automobile resembled respondent's and that he had not ascertained the identification or registration of it. Mr. Knight also reported that respondent was regularly going out with a married man (referring to Jerry Brown), who was living with his wife. (Court of Appeals Appendix 59-60).

On the basis of the information received from Mr. Knight and without further

investigation, petitioner instructed his administrative assistant on February 9, 1973, to discharge respondent.

There is a Guilford County Sheriff's Department general order which provides that intoxicants shall not be consumed while on duty. Petitioner interprets this order to the effect that social drinking or moderate consumption of alcoholic beverages, not during duty hours, is permissible. (Court of Appeals Appendix 57-58). Four Sheriff's deputies, all of them white, had been discharged within the five years preceding respondent's discharge for violation of this general order. One of these individuals was arrested for public drunkenness and disorderly conduct; another was arrested for driving under the influence of alcohol. Two of the individuals were observed to be under the influence of alcohol while on the job. (Court of Appeals Appendix 61).

Petitioner's same general order provides that the employees of the department are not to act in any manner to bring reproach on the department, and are to live a civil and orderly life. (Court of Appeals Appendix 57-58). During the five years preceding respondent's discharge, four white deputies were discharged for sexual immorality in violation of the same general order. All four of these individuals either had lived with or

spent the night with persons of the opposite sex to whom they were not married. (Court of Appeals Appendix 61).

Following respondent's discharge, Petitioner called the New Bern chief of police and arranged a meeting with him in Greensboro. Petitioner met with the chief on about February 16, at which time petitioner accused respondent and Mr. Rogers of having occupied a motel room together. Messrs. Rogers and Buck were present at the meeting, and they pointed out that not Mr. Rogers alone, but both of them were present in the room with respondent. (Court of Appeals Brief of Appellee, 27-31, 44-47). At that time petitioner denounced respondent and Messrs. Buck and Rogers for immoral behavior, and recommended the dismissal of the New Bern officers. (Court of Appeals Brief of Appellee 28, 36-37).

On cross examination petitioner testified:

> Q. And you have told, have you not, under oath in the pleadings here and to me and to anyone who has come to you and inquired about why Miss Small was let go, you have told, she was let go on account of drinking and on account of being in a motel room with men?

> A. Drinking and in the company of two married men and being in the car. (Court of Appeals Brief of Appellee 47).

Following respondent's termination, petitioner told respondent's father that the reasons for her termination were her drinking and immoral conduct. (Petition for certiorari 4).

Following her discharge, respondent made diligent and good faith efforts to secure new employment. (Court of Appeals Appendix 61-62). Respondent made applications to 109 different prospective employers until she finally secured a position as a counselor with Craven Community College in May, 1974. (Court of Appeals Appendix 39-45, 62). Six of the positions for which respondent applied were in the law enforcement field. (Court of Appeals Appendix 39-44). Prior to obtaining full time employment, respondent worked on and obtained her master's degree and held two temporary jobs. (Court of Appeals Appendix 62).

The district court concluded that, "Since the plaintiff was discharged for alleged intoxication and immoral conduct, her termination was based on reasons which would tend to damage her standing and associations in her community by tarnishing her

reputation and good name. Termination for these reasons would also impose on plaintiff a stigma or employment record that would foreclose her freedom to take advantage of other employment opportunities. Therefore, the plaintiff was entitled to notice of the reasons for discharge and the opportunity for a hearing to refute the charges." (Court of Appeals Appendix 62-63).

However, the court decided that respondent's allegation of racially discriminatory discharge was not supported by the evidence. (Court of Appeals Appendix 63-65).

The court computed respondent's back pay entitlement to be $4,092.66, and a judgment in that amount was entered. (Court of Appeals Appendix 55, 65-68).

Petitioner appealed to the United States Court of Appeals for the Fourth Circuit. The court of appeals affirmed the district court, finding that petitioner had published the reasons for respondent's dismissal, holding the decision consistent with Bishop v. Wood, __ U.S. __, 48 L.ed.2d 684 (1976). Petitioner petitioned the court of appeals for a rehearing in banc, and this petition was denied by order of October 21, 1976. (Petition for Certiorari A-10 to 11).

REASONS FOR DENYING THE WRIT

I. CONSISTENT WITH THIS COURT'S DECISION OF BISHOP V. WOOD, RESPONDENT WAS ENTITLED TO NOTICE AND HEARING IN CONNECTION WITH HER DISCHARGE, SINCE PETITIONER'S ANNOUNCED REASONS FOR THE TERMINATION WERE IMMORAL CONDUCT WITH MARRIED PERSONS AND INTOXICATION.

Without regard to whether respondent as a public employee had a "property interest" to continued employment, she had a constitutionally protected "liberty interest", which was infringed when she was discharged without notice and hearing after having been accused of misconduct. Board of Regents v. Roth, 408 U.S. 564, 573 (1972).

In Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971), the Court decided that "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."

Roth requires that procedural due process be satisfied before an employee is dismissed where a charge has been made "that might seriously damage his standing and associations in the community . . ., for example that he has been guilty of dishonesty, or immorality". 408 U.S. at 573 [Emphasis supplied]. The

Court in Roth expressed a concern about the likelihood of the government's imposition on the employee of a "stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." 408 U.S. at 573. The right of "liberty" includes the right to "engage in any of the common occupations of life". Meyer v. Nebraska, 262 U.S. 390, 399 (1923). Where future employment opportunities are threatened or foreclosed, procedural due process applies. Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 185 (1951) (Jackson, concurring); Schware v. Board of Bar Examiners, 353 U.S. 232, 238 (1957).

In the present case petitioner discharged respondent for allegedly engaging in immoral conduct with married men and becoming intoxicated. The present facts fit clearly within the rule of Board of Regents v. Roth,

Bishop v. Wood, U.S. 48 L.ed.2d 684 (1976), made it clear that the communication of the governmental employer's stigmatizing allegations must be public, so that there would be some likelihood of actual interference with prospective employment, before the constitutionally protected liberty interest is deemed invaded. In Bishop v. Wood the stigmatizing reasons for discharge of a policeman were communicated to him orally in private and were also stated in answer to interrogatories during the course

of that lawsuit. The Court concluded that Bishop's liberty interest was not invaded under these circumstances since the first communication was not made public, and the police chief was immunized from liability from answers to interrogatories under oath that were filed in court.

In contrast to Bishop v. Wood, the record in the present case shows that within a week after firing respondent, petitioner got in touch with the chief of police of New Bern, met with him and accused respondent and New Bern police officers Buck and Rogers of immoral behavior. (Court of Appeals Brief of Appellee 27-31, 44-47). Petitioner acknowledged under cross examination that "To anyone who has come to [me] . . . and inquired about why Miss Small was let go, [I] . . . have told she was let go on account of drinking and on account of being in a motel room with men." (Court of Appeals Brief of Appellee 47). Petitioner also told respondent's father that he had dismissed her for immoral conduct and drinking. (Petition for Certiorari 4). In addition it can readily be inferred that petitioner's reasons for discharging respondent were publicized, from the fact that she was unable to find permanent employment for about fifteen months during which time she made applications to in excess of 100 prospective employers. (Court of Appeals

Appendix 39-45, 61-65).

The present case differs from Bishop v. Wood in this important respect: the condemnatory statements about Bishop were made in private, but those about respondent were made in public. As stated by the court of appeals in its opinion, "The Court reasoned that if the reasons were not made public, no stigma could result, no matter how serious or false the grounds for discharge. This case is different; here the Sheriff publicized his reasons." (Petition for Certiorari A-11).

The case of Paul v. Davis, __ U.S. __, 47 L.ed.2d 405 (1976), relied upon by petitioner, is not at all applicable. There the Court simply held that the Civil Rights Act, 42 U.S.C. sec. 1983, does not include a federally remediable tort of defamation. The Court did not overrule and in no way disapproved of Board of Regents v. Roth, supra, and Wisconsin v. Constantineau, supra. The Court distinguished these and other cases, holding that an actionable claim of deprivation of the Fourteenth Amendment interest in liberty arises where stigmatizing statements are made in connection with the denial of some benefit or privilege, such as government employment.

Petitioner's reading of Bishop v. Wood, is strained indeed; he seems to be of the view that the statements of aspersion must

be made to the public at the very moment of the employee's discharge; respondent must contemplate that the holding of a press conference or an announcement in a public meeting at the instant of dismissal is a prerequisite to liability. If this were so, all of the substance would be drained from the "liberty" interest that public employees have under the Fourteenth Amendment, identified in Board of Regents v. Roth. A much more sensible view, one that is consistent with this Court's reasoning in Bishop v. Wood, is to hold the liberty interest invaded whenever public statements are made by the employer in such proximity to the discharge, as to be reasonably likely to interfere with the employee's efforts to secure new employment. Such was the case here.

Finally petitioner contends that no damages should have been awarded in this case without proof of "actual injury or actual loss." Petitioner concedes, as he must, that if respondent's property interest had been violated, there would have been a clear entitlement to back pay, but he argues inconsistently that this should not be the result where it is the liberty interest instead that has been invaded. The injury is identical; when either the property or the liberty interest has been violated by discharge without notice and hearing, and a period of unemployment follows, there has been a salary or wage loss.

The invasion of the liberty interest wrongfully impedes the employee's opportunity to secure new employment, just as the infringement of the property interest illegally deprives the employee of his existing job. The district court made careful findings concerning respondent's diligent and good faith efforts to secure a new job, and carefully limited her back pay entitlement only to that period during which such efforts were being made. Back pay was treated by the court as an equitable remedy in this case, and no damages, as such, were awarded. (Petition for Certiorari A-7 to 9). Certainly what the district court did with regard to back pay was consistent with prior decisions of this Court. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). Also it must be observed that respondent, who is so quick to accuse petitioner of litigating issues not raised by the pleadings, did not present to the court of appeals the question of whether back pay should have been awarded, so that this Court should decline to review the matter. Desper v. Starved Rock Ferry Co., 342 U.S. 187 (1952) and Bivens v. Six Unknown Agents, 403 U.S. 388 (1971).

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THAT THE PARTIES HAD LITIGATED BY CONSENT THE ISSUE OF WHETHER RESPONDENT'S LIBERTY INTEREST HAD BEEN VIOLATED BY THE DISCHARGE FROM PUBLIC EMPLOYMENT.

Petitioner claims that he was ambushed in this case, that the judgment of the district court was the first notice he received of respondent's claim that her procedural due process rights had been violated. The record establishes this assertion to be false.

All of the evidence concerning petitioner's publication of reasons for the dismissal of respondent, was admitted without interposition of objection by petitioner. Generally implied consent by the parties to try an issue is found from the circumstance alone that evidence on that issue is introduced without objection. 6 Wright and Miller, Federal Practice and Procedure: Civil, sec. 1493, p. 463 and n.68 (1971); Norris v. Bovina Feeders, Inc., 492 F.2d 502 (5th Cir. 1974); Arkla Exploration Co. v. Boren, 411 F.2d 879 (8th Cir. 1969).

In the present case, however, evidence of petitioner's consent to trial of the procedural due process issue goes far beyond the mere failure to object. The district court requested from the parties supplementary briefs and proposed findings of fact and conclusions of law following the trial. One of the two major arguments of respondent's supplementary trial brief was that petitioner had denied her procedural due process, that "Because stigmatizing charges were made against plaintiff, which she was not given an opportunity to test or refute, her Fourteenth

Amendment 'liberty' interest was violated by the discharge in this case." (Record, No. 31, pp. 3-4). Both petitioner and respondent filed a proposed finding of fact No. 12, which pertains to the procedural due process claim:

> 12. Defendant believed the report received from Deputy Sheriff Knight. He instructed his administrative assistant on February 9, 1973, to discharge plaintiff. The order was carried out on the same date. Defendant's asserted reasons for discharging plaintiff were that she had become intoxicated and that she had engaged in immoral conduct with married men.

Respondent offered a proposed conclusion of law to the effect that "Because plaintiff's good name, reputation, honor and integrity were stigmatized by the allegations that she had become intoxicated and had engaged in immoral sexual conduct, plaintiff was entitled to a pre-discharge notice and hearing." (Record, No. 31).

After having been duly served with respondent's trial brief and proposed findings of fact and conclusion of law clearly dealing with the liberty interest question, and after

having concurred in the part of the findings of fact that related to this point, petitioner at least should have filed a motion for a new trial or to set aside the judgment under Rule 60 of the Rules of Civil Procedure, at a time when his claimed error could have been cured by the district court. Petitioner did not do so, however. Even in petitioner's opening brief in the United States Court of Appeals for the Fourth Circuit, there was no mention made of the alleged trial of this issue without consent. It was not until after respondent's brief was filed in the court of appeals, that petitioner came up with this new idea in a reply brief.

This case must be held to come within the provision of Rule 15(b) of the Rules of Civil Procedure that, "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Moreover, the district court's determination that issues have been tried by consent is a discretionary one, and will not be reversed, except upon a showing of abuse. 6 Wright and Miller, Federal Practice and Procedure: Civil, sec. 1493, p. 469 and n.74; Lones v. Detroit, Toledo and Ironton Railway Company, 398 F.2d 914 (6th Cir. 1968), cert. den., 393 U.S. 1063 (1968); Cole v. Layrite Products Co., 439 F.2d 958 (9th Cir. 1971).

Last in this connection petitioner faults the court of appeals for making its own findings to the effect that petitioner's stigmatizing statements about respondent were publicized close in time to her discharge. The evidence in this point is not conflicting. The court of appeals is empowered to make findings based on uncontroverted evidence when the trial court did not do so. Atkins v. Greenville Ship Building Corporation, 411 F.2d 279 (5th Cir. 1969); Gediman v. Anheuser Busch, Inc., 99 F.2d 537 (2d Cir. 1962); Damanti v. A/S Inger, 314 F.2d 395 (2d Cir. 1963). If petitioner claimed that he had evidence to contradict that which he himself has admitted on cross examination, then his remedy was to seek relief in district court under Rule 60 of the Rules of Civil Procedure, and not to petition this Court for certiorari.

III. THE PETITION FOR CERTIORARI SHOULD BE DISMISSED FOR FAILURE TO FILE PETITION FOR WRIT OF CERTIORARI WITHIN THE TIME ALLOWED.

Petition for writ of certiorari in this proceeding is dated January 4, 1977, and was mailed to the Court on January 5, 1977, according to the covering letter.

The decision of the United States Court of Appeals for the Fourth Circuit, which is sought to be reviewed in this proceeding,

was filed September 17, 1976. (Petition for Certiorari A-10).

A petition for writ of certiorari seeking to review the decision of a United States court of appeals in a civil case must be filed within 90 days after the entry of the judgment or decision. 28 U.S.C. sec. 2101(c); Rule 22.3, Supreme Court Rules. No application for extension of time within which to file the petition has been sought to the best of respondent's knowledge. More than 90 days separates the date of decision of the United States Court of Appeals for the Fourth Circuit and the date of filing of the petition in this Court. Accordingly, the petition for writ of certiorari should be denied as not timely filed. Bradford Electric Light Co. v. Clapper, 284 U.S. 221 (1931).

Petitioner did file a petition for rehearing in the court of appeals, and this petition was denied on October 21, 1976. (Petition for Certiorari, A-11). However, the judgment of the court of appeals was entered on September 17, and the petition to rehear should not be regarded as having the effect of extending the statutory 90 day period for petition for certiorari. This is so because under the present Rule 41, Rules of Appellate Procedure, a formal mandate no longer issues, and the opinion and

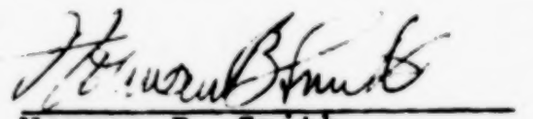
judgment of the court operate as the mandate, Warren v. United States, 358 F.2d 527 (D.C. Cir. 1965); and also because Rule 41(b) now contains provisions for stay of the court of appeals mandate pending application to the Supreme Court for writ of certiorari, so that is is possible for the mandate not to have issued at all before the petition for certiorari is filed. Were it not for these provisions, perhaps it could be argued that the petition for rehearing tolled the 90 day limit for filing the certiorari petition. See Department of Banking v. Pink, 317 U.S. 264 (1942).

CONCLUSION

For the reasons stated in Part III of respondent's reasons, the petition for certiorari should be dismissed as not timely filed. Alternatively, for the reasons stated in Parts I and II of respondent's reasons, the petition for certiorari should be denied, since the decision of United States Court of Appeals for the Fourth Circuit is consistent

with the decisions of this Court.

Respectfully submitted,



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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-941

PAUL H. GIBSON, SHERIFF OF GUILFORD COUNTY,

Petitioner,

vs.

VOULYNNE SMALL,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioner Paul H. Gibson respectfully replies to the respondent's brief in opposition to his petition for writ of certiorari, by showing the Court the following:

QUESTIONS PRESENTED

I.

WHETHER THE PETITION FOR CERTIORARI SHOULD BE DISMISSED FOR NOT HAVING BEEN FILED WITHIN THE TIME ALLOWED?

The decision of the United States Court of Appeals for the Fourth Circuit in this matter was filed on September 21, 1976. Within fourteen days thereafter, the petitioner filed with the United States Court of Appeals for the Fourth Circuit a petition to rehear the cause. On October 21, 1976, an order was entered denying the petition to rehear. A petition for a writ of certiorari was then docketed in this court on January 6, 1977.

This Court has consistently held that a timely-filed petition for a rehearing in the Court of Appeals tolls the running of the ninety day limit within which to petition for a writ of certiorari. Department of Banking v. Pink, 317 U.S. 264 (1942); N.L.R.B. v. Mackay Radio and Telegraph Co., 304 U.S. 333 (1937); U.S. v. Seminole Nation, 299 U.S. 417 (1936); Gypsy Oil Company v. Escoe, 275 U.S. 498 (1927); Morris v. United States, 270 U.S. 151 (1925); Citizens Bank of Michigan City v. Opperman, 249 U.S. 448 (1918). For the respondent to maintain otherwise is for her to disregard completely the long-standing practice of this Court as evidenced in the above-cited cases.

CONCLUSION

The petition for a writ of certiorari in this cause was filed within ninety days of the date of the filing of the Court of Appeal's opinion plus the number of days between the date of the filing of the petition to rehear and the order denying the petition to rehear, and it is therefore timely filed, and is entitled to be considered by the Court on its merits.

Further, the brief of the respondent highlights and emphasizes the facts in this case which raise constitutional questions heretofore unanswered by this Court, thereby further demonstrating why the petition for a writ of certiorari should be granted.

Respectfully submitted, this the 25th day of February, 1977.

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